

1 THE HONORABLE THOMAS S. ZILLY
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 BUNGIE, INC.,

10 Plaintiff,

11 v.

12 AIMJUNKIES.COM; PHOENIX DIGITAL
13 GROUP, LLC; DAVID SCHAEFER; JORDAN
14 GREEN; JEFFREY CONWAY; and JAMES
15 MAY,

Defendants.

No. 2:21-cv-00811-TSZ

BUNGIE, INC.'S REPLY IN
SUPPORT OF ITS MOTION FOR
PROTECTIVE ORDER

BUNGIE'S REPLY ISO MOT.
FOR PROTECTIVE ORDER
(No. 2:21-cv-00811-TSZ)

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I. INTRODUCTION

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3 Bungie seeks only narrow relief: an order designating John Doe's name and identifying
 4 information as Highly Confidential under the parties' Stipulated Protective Order. Bungie does
 5 not seek to restrict Defendants' ability to ask relevant questions in deposition, including about John
 6 Doe's job history and his interactions with Defendants and their business. Defendants can readily
 7 probe relevant topics, even if only their counsel knows John Doe's name.

8 Courts routinely grant Bungie's requested protective order in circumstances similar to this,
 9 where the *name* of the witness is not material, and there is a real threat and fear of harassment or
 10 abuse if the name is released. Bungie respectfully requests that the Court grant its Motion and
 11 enter the requested Protective Order to protect the identity of John Doe.

12

II. ARGUMENT

13

14

A. Bungie Seeks a Narrowly-Tailored Protective Order

15

16 Contrary to Defendants' sweeping statements, Bungie's requested protective order would
 17 not restrict Defendants' access to information relevant to their claims and defenses. The requested
 18 order would only withhold John Doe's name and identifying information from Defendants
 19 themselves (not their counsel). Courts routinely restrict disclosure of identifying witness
 20 information, particularly where a witness's testimony is otherwise not subject to the protective
 21 order, as Bungie is requesting here. *See Everyday Discount, Inc. v. State Farm Gen. Ins. Co.*, No.
 22 CV 18-902-GW (PLAx), 2018 WL 11346535, at *3 (C.D. Cal. Oct. 30, 2018) (permitting
 23 redaction of the identity of witness from a police report while permitting disclosure of all
 24 substantive information from that witness); *Alaska Cnty. Acton on Toxics v. Aurora Energy Servs.,*
 25 *LLC*, No. 3:09-cv-255-TMB, 2012 WL 12537418, at *4 (D. Alaska May 7, 2012) (granting
 26 protective order preventing disclosure of names and identifying information of witnesses where
 defendants' counsel inquired about and obtained substantive information about witness's
 testimony). Defendants' counsel will be able to ask questions about, and Defendants will not be

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1 restricted from attending testimony concerning, whatever “critical” testimony Defendants might
 2 seek to elicit, including John Doe’s analysis of the Cheat Software (if any), whether or not he
 3 accepted or even saw AimJunkies.com’s Terms of Service, or whether he knows or has a
 4 “grievance” with Defendants.

5 In addition to disregarding this case law protecting witness identifying information from
 6 disclosure, Defendants also misapply the Ninth Circuit’s factors governing protective orders such
 7 as these. *See Opp’n 5-8; Alaska Cnty. Acton on Toxics*, 2012 WL 12537418, at *2 (citing *In re*
 8 *Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 n.5 (9th Cir. 2011)). The
 9 applicable factors weigh heavily in favor of granting a protective order.

10 John Doe has a legitimate privacy interest in keeping his identity hidden from Defendants’
 11 themselves, particularly given Schaefer’s direct threat to “open [him] up” and “ask him who his
 12 girlfriend might have been or when was or where they rented from at the time or what they did
 13 together, let’s see what his fucking answers are,” and his further threat to “see what they got hiding
 14 in their closets.” Dini Decl., Ex. D (Schaefer Oct. 31, 2022 30(b)(6) Tr.) at 28:12-17, 29:6-11.¹
 15 These specific threats targeted at John Doe are far from the “normal and understandable
 16 frustration” of a defendant (Opp’n p. 9), but instead evidence a clear intent to harass, embarrass,
 17 and/or annoy John Doe, which is more than sufficient to merit a protective order.² *See Alaska*
 18 *Cnty. Acton on Toxics*, 2012 WL 12537418, at *4.

19 Moreover, the requested protective order will promote fairness and efficiency. The
 20 requested order withholds a small amount of irrelevant information from disclosure to Defendants,
 21 promotes John Doe’s legitimate privacy interests, and protects Defendants’ ability to inquire

22

23 ¹ To be clear, at no point did Bungie ever ask questions concerning Schaefer’s “sex life.” Opp’n p. 9. Bungie
 24 received documents from PayPal indicating Phoenix Digital made regular payments to Lisa Holliday that were at the
 25 same time and in the same amount as payments made to Phoenix Digital’s other members, and so Bungie asked
 26 whether Ms. Holliday was Schaefer’s girlfriend or wife in order to understand why Schaefer’s payments were directed
 to her. *See* Dini Decl., Ex. D at 28:1-30:8, Ex. F at 144:12-146:19.

² In addition, since Bungie filed its Motion, Bungie’s security team detected, and worked with a third-party
 platform to remove, a threat believed to be specifically directed at John Doe based on their arbitration testimony and
 on the identifying letters used in the arbitration.

1 regarding the subjects of this lawsuit.³ Contrary to Defendants' mischaracterization, Bungie is not
 2 arguing that its requested protective order is compelled by the parties' Stipulated Protective Order
 3 (Dkt. No. 60), nor that Defendants are bound by the parties' stipulation in the arbitration that John
 4 Doe's name was to be remain Highly Confidential during the evidentiary hearing. Opp'n p. 2-3.
 5 Rather, these agreements underscore the conclusion that a Highly Confidential designation will
 6 cause neither prejudice nor inefficiencies. Defendants *agreed* to examine John Doe in the
 7 arbitration evidentiary hearing under this designation and have taken depositions subject to this
 8 designation, without complaint or prejudice to their ability to elicit the factual testimony they have
 9 sought. And they have not provided a compelling reason why the remainder of the case cannot be
 10 conducted in a similar manner.

11 The remaining Ninth Circuit factors also weigh in favor of granting the protective order.
 12 That the information sought to be protected is not a matter of public health and safety; that the
 13 information does not involve an issue important to the public; and that that John Doe is not a public
 14 entity or official—these factors all weigh *in favor* of the protective order, not against. *See Alaska*
 15 *Cnty. Acton on Toxics*, 2012 WL 12537418, at *4 (holding that disclosure of witness identity "is
 16 not important to . . . [public] health and safety"); *cf. Perkins v. City of Modesto*, No. 1:19-cv-
 17 00126-LJO-EPG, 2020 WL 4748273, at *5 (E.D. Cal. Aug. 17, 2020) (the fact that some parties
 18 benefiting from protective order are public officials weighs in favor of disclosure).

19 Under the circumstances, a protective order is warranted and appropriate.

20 **B. Defendants' Criminal Prosecution Case Law Is Inapplicable**

21 Defendants do not address *any* case law cited by Bungie in which courts regularly order
 22 that a witness's name may be completely protected from disclosure or designated as "attorneys'
 23 eyes only." *See generally* Opp'n. Instead, Defendants rely on entirely inapposite cases concerning
 24 criminal prosecutions. Opp'n p. 2, 3 (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968) and *United*

25

 26 ³ While Bungie filed this case to protect its rights in the "public arena" (Op'n p. 2 n.1), John Doe's testimony
 was not required nor anticipated for Bungie to prevail on its primary claims. John Doe's testimony, to the extent
 relevant in this case, is primarily relevant only to Defendants' dubious counterclaims.

1 *Sates v. Hernandez*, 608 F.2d 741, 745 (1979)). In *Smith*, the issue before the Court was whether
 2 the defendant was denied his Sixth Amendment right of the accused in a *criminal prosecution* to
 3 confront the witnesses against him. *Smith*, 390 U.S. at 129. The Sixth Amendment is expressly
 4 focused on “criminal prosecutions” and does not govern civil cases. U.S. Const. amend. VI.; *see*
 5 *also Lacambra v. City of Orange*, No. 8:18-cv-00960-RGK-KES, 2019 WL 6799108, at *9 (C.D.
 6 Cal. Aug. 16, 2019) (citing *Austin v. United States*, 509 U.S. 602, 608 (1993)). *Hernandez*
 7 similarly concerned a criminal prosecution, and even there the court affirmed the district court’s
 8 pre-trial decision to withhold a prosecution witness’s address, finding that “nondisclosure of an
 9 informant’s address would be justified . . . where the answer might subject the witness to
 10 harassment, humiliation, or danger.” *Hernandez*, 608 F.2d at 745 (citing *United States v. Harris*,
 11 501 F.2d 1, 9 (9th Cir. 1974)). In this case, Defendants are not subject to criminal prosecution,
 12 and their case law therefore provides them no relief.

13 **III. CONCLUSION**

14 Bungie respectfully requests a protective order designating John Doe’s name and other
 15 identifying information as Highly Confidential under the parties’ Stipulated Protective Order
 16 (Dkt. No. 60).

17
 18 I certify that this memorandum contains 1,315 words in compliance with the Local Civil
 19 Rules.

20 Dated: April 28, 2023

By: s/ William C. Rava

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